No. 16,091

IN THE

United States Court of Appeals

For the Ninth Circuit

CHARLES W. GRIMM,
Appellant,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORATION,
Appellee.

On Appeal from the United States District Court for the Southern District of California, Northern Division.

Honorable Gilbert H. Jertberg, Judge.

BRIEF FOR CALIFORNIA SPRAY-CHEMICAL CORPORATION, APPELLEE.

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I.

INTRODUCTION.

The decision in this case rests upon, and is to be determined by, the power of the Court in passing upon a motion for a new trial where the moving party requests a new trial as to only some of the issues. The second point raised by appellant in his brief, that is, whether the order appealed from is an appealable

order, is, we believe, determined by the same factors which determine the first point, and, therefore, a decision as to one is a decision as to both.

Appellant has not argued, and, apparently, does not contend, that, assuming the Court to have the power to make the order made, it was nonetheless an abuse of discretion. In other words, we may assume that if the Court had the power to order a new trial as to all issues, appellant is satisfied with the exercise of that power.

Accordingly, we will look at the problem from the standpoint of jurisdiction, and will not discuss the various factors involved in the exercise of the discretionary power.

Due point should be mentioned, however, and that is that until the filing of appellant's opening brief we did not know that he was *not* going to attach the order of the Court from the standpoint of being an abuse of discretion. We had, of necessity, therefore, to be prepared for any contingency.

We believe that no citation of authorities is necessary to establish the elemental rule that the right or obligation of the Court in granting or refusing to grant a partial new trial is to be determined by the closeness of the issues and whether one or more of those issues can be divorced from the others without doing an injustice to some of the parties. When appellant appealed from the order of the trial Court refusing to order such a separation of issues, we felt we must, of necessity, present the entire record so

that the "togetherness" of the entire matter could be illustrated. Now, however, appellant has not challenged this, and, in fact, on page 28 of his brief he, for all intents and purposes, concedes that the Court was entitled to do what it did—if it had the power.

Our only interest then is in jurisdiction and not in the discretionary power of the Court.

II.

APPEALABILITY OF ORDER.

The only other point (other than the jurisdiction of the Court) which appellant raises is whether the order appealed from is an appealable order. If it is not, then, of course, this appeal should be dismissed and the primary question reserved for future decision.

Ordinarily it is universally held that an order on a new trial motion is *not* appealable (Moore's Federal Practice, Vol. 6, page 3891). This is because Section 1291 of Title 28, U.S.C.A., grants jurisdiction on appeal from *final decisions*. As the discussion in Moore's points out, whether the motion be granted or denied, it, in itself, is never the final decision. Sooner or later there will be a *judgment* and upon appeal from that judgment all prior orders may be reviewed.

This is the ordinary rule. An exception has grown, which is now pretty well recognized. That exception is that if the Court exceeds its *jurisdiction* in making the order concerning a new trial (Moore's, Vol. 6,

page 3899) an appeal or an extraordinary writ will be allowed because, except for the unauthorized action of the Court, there would have been a final judgment.

In other words, the appealability of the present order is determined by whether or not the Court had jurisdiction to make such order—leaving out questions affecting the propriety of the order as a discretionary act. Thus it appears that both of appellant's issues will be resolved by the determination of that one question. If the Court had jurisdiction, the order is not appealable; but, on the other hand, since only the *power to make the order* is challenged, it would be affirmed anyway—so, actually, only one problem is presented—jurisdiction.

III.

THE TRIAL COURT HAD JURISDICTION TO ORDER A NEW TRIAL ON ALL ISSUES.

There are many cases in which the propriety of granting or refusing to grant a limited new trial is discussed and we believe the applicable rules are fairly well understood. Typical of these cases are *Schuerholz v. Roach,* 58 Fed. (2d) 32, and *Southern Railway Company v. Madden,* 235 Fed. (2d) 198. But these cases have not involved the issue presented here—where the moving party requests a new trial on only part of the issues and the Court orders that all issues be retried. And, in fact, we have been able to find no cases in the United States Courts where that problem has been discussed, nor has counsel for appellant cited any.

The problem has been considered, however, by the Supreme Court of California in two cases, *Hamasaki v. Flotho*, 39 Cal. (2d) 602 and *Leipert v. Honold*, 39 Cal. (2d) 462. We realize, of course, that these decisions are not binding upon this Court, but there is a similarity in the fact that the State Code sections, the same as Rule 59 of the Federal Rules of Civil Procedure, do not attempt to define the power of the Court on motions for new trial with complete exactitude and it was, therefore, necessary for the California Supreme Court to decide whether inherent power existed.

Since these two cases are the only ones discussing the question, we would like to take the liberty of following the reasoning of the Court in the *Hamasaki* case by quoting the following:

> "*The controlling question, therefore, is whether or not the trial court, on plaintiffs' motion for a new trial on the issue of damages only, had power to grant a new trial on all issues.*
>
> This question is analogous to that presented when an appeal is taken from only a part of a judgment. To simplify litigation a party who is aggrieved by a judgment is ordinarily entitled to limit his appeal to the parts thereof with which he is dissatisfied. Similarly, when he is seeking relief in the trial court by way of a new trial, he ordinarily may seek a retrial only of the issues on which the decision has been adverse to him. In either case, however, situations may arise where the issues are so interwoven that a partial retrial would be unfair to the other party. When, as in the present case, for instance, the jury has, by

compromising the issues of liability and damages, inextricably interwoven those issues, a retrial of the damages issue alone based on the erroneous assumption that defendant's liability has been determined would be extremely unjust to him. A situation is thus presented where the plaintiff has been aggrieved, but the specific relief he seeks may not be granted without doing an injustice to the defendant. Since the relief requested may not be granted, the trial court, if the issue is presented by motion for a limited new trial, or the appellate court, if the issue is presented by a partial appeal, must do one of two things. It must either deny all relief, or order a new trial on both issues.

In the case of partial appeals it is settled that the court may review as much of the judgment as is necessary to give the appellant the relief he seeks even though it is necessary to reverse parts of the judgment with which he has no quarrel and from which neither party has appealed. (Milo v. Prior, 210 Cal. 569, 571 (292 P. 647); Blache v. Blache, 37 Cal.2d 531, 538 (233 P. 2d 547); American Enterprise, Inc. v. Van Winkle, ante, p. 210 (246 P.2d 935); Bailey v. Bailey, 60 Cal. App. 2d 291, 293 (140 P.2d 693).)

Logically the same rule should govern the trial court when passing on a motion for a limited new trial.

It is suggested that in a particular case both parties may prefer the judgment as originally entered to the expense and uncertainty of a new trial on all issues, and that therefore the trial court should not have jurisdiction to grant a complete new trial in the absence of a motion therefor. There is no reason why, if a limited new

> trial cannot be granted, the parties should not be allowed to adopt the jury's compromise as their own. In such a case, however, the trial court would undoubtedly respect their preference in this respect and deny any new trial at all. (Cf., Leipert v. Honold, ante, p. 462 (247 P. 2d 324).) Accordingly, it is not necessary to limit the jurisdiction of the trial court in passing upon a motion for a partial new trial to prevent a complete new trial that neither party wants. If the defendant does not wish a new trial he need not move for one, and if the plaintiff does not wish a complete new trial, if he cannot have a partial new trial, he need simply say so."

The applicability of this reasoning is as important in United States Courts as it is in the Courts of California. That the Court possesses such inherent power seems only just and equitable. Surely, rules of procedure, which are designed only to speed and assist the administration of justice should not be used to thwart it! The trial Court, as quoted by appellant, felt that justice required that all issues be submitted on a new trial. To hold that such order was in excess of its jurisdiction is to use the rules of procedure as a sword to defeat the administration of justice; such, obviously, could never have been intended by the authors of the rules. Appellant, having initiated the new trial proceedings, opened the gateway for the exercise by the Court of all of its inherent power to administer justice in a complete and equitable manner.

One further matter remains to be mentioned. Appellant, in offering several alternatives as the decision of this Court, has overlooked one important fact. The

trial Court has held that the verdict, as returned, was not a true verdict, that it represented a decision on the question of liability no more than it did on damages.

Thus, if the order is to be reversed only one result is possible—the trial Court must be given the opportunity to decide where the interests of justice would be best served by allowing the verdict to stand, or by ordering a partial new trial. Any of the other alternatives suggested overlook the fact that the Court has not passed upon this question.

IV.

CONCLUSION.

We respectfully submit that the action of the trial Court was within its jurisdiction, and that since its action has not been challenged from the standpoint of exercise of discretion the order must be affirmed; or, in the alternative, the order must be held to be non-appealable and the appeal dismissed.

Dated, Fresno, California,
December 10, 1958.

Respectfully submitted,
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